Supreme Court, U.S.
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98-1925

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER JOHN CAMPBELL,
Petitioner,

v.

PEOPLE OF THE CITY OF PLYMOUTH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

I. WHETHER PETITIONER'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED?

Respondent, The People of the City of Plymouth, answer "Yes".

Petitioner, Christopher John Campbell, answers "No".

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

On September 15, 1996, at approximately 4 a.m., petitioner, Christopher John Campbell, was stopped by City of Plymouth Police Officer Ronald Bianchi who had observed petitioner's vehicle rapidly approaching from behind and driving left of center. Officer Bianchi observed petitioner's vehicle cross the center of the road four times. (Tr, 12/11/96, pp 8-10, 50). Police Officer Bianchi testified that he noted a strong odor of intoxicants on the petitioner, that his eyes were glassy and that he was barefoot. (Tr, 12/11/96, p 34). The petitioner admitted that he had been drinking. (Tr, 12/11/96, p 34).

Police Officer Bianchi conducted several field sobriety tests on the petitioner which he failed. When reciting the alphabet, petitioner began calling out letters at random after the letter "F". When counting from 75 to 93, the petitioner left out numbers and went to 100. When counting from 93 to 75, the petitioner left out several numbers and went past 75. The petitioner lost his balance within five seconds on each one leg balance test. (Tr, 12/11/96, pp 35-36). Police Officer Bianchi then read the petitioner his preliminary breath test (PBT) rights and administered a PBT. Following that, Officer Bianchi placed the petitioner under arrest for operating under the influence of intoxicating liquor (OUIL). (Tr, 12/11/96, p 37).[1]

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[1] Consistent with the foregoing testimony, Officer Bianchi testified that he did not arrest the defendant immediately upon stopping him. (Tr, 12/11/96, p 41). He arrested him after he had administered the PBT. (Tr, 12/11/96, p 44).

On October 23, 1996, petitioner filed his Motion to Dismiss for Failure of the People to Establish the Requisite Reasonable Cause to Effect a Traffic Stop and Otherwise. In that motion, the petitioner argued that reasonable cause did not exist to effect the traffic stop and that probable cause did not exist to arrest him. Pursuant to the petitioner's request, an evidentiary hearing was conducted in the district court on December 11, 1996, before Judge John E. MacDonald. Following the presentation of evidence, defense counsel argued that Police Officer Bianchi's testimony concerning his observation of the petitioner's vehicle crossing the center line four times (which was a basis for the traffic stop) was not "plausible", "believable", "credible", and was "physically improbable". (Tr, 12/11/96, pp 110-111). Based on those contentions, defense counsel argued that ". . . there was no reasonable cause within which to effect a traffic stop in this matter." (Tr, 12/11/96, p 112). Defense counsel also argued that reasonable cause to administer the PBT did not exist. (Tr, 12/11/96, p 113). Lastly, defense counsel argued that probable cause did not exist to arrest the petitioner. (Tr, 12/11/96, p 113). *See also* Tr, 12/11/96, p 119. For those reasons, defense counsel requested that the matter be dismissed. (Tr, 12/11/96, p 119).

In opposition to the motion, the prosecutor argued that Officer Bianchi's testimony concerning observing the petitioner's vehicle crossing the center line four or five times was clear. (Tr, 12/11/96, p 120). He noted that Officer Bianchi had testified that the petitioner had failed all of the field sobriety tests. The prosecutor requested that the motion to dismiss be denied.

Following the arguments of counsel, Judge MacDonald issued his decision from the bench. Judge

MacDonald noted the following facts.[2] The first relevant fact was that Officer Bianchi had observed the petitioner's vehicle cross the center line of the road at least four times. (Tr, 12/11/96, p 123). Based upon that fact, and the time of night, Judge MacDonald concluded that it was reasonable for Officer Bianchi to believe that alcohol was involved and, therefore, ". . . the Officer had every right to stop the individual and find out whether or not he was drinking." (Tr, 12/11/96, p 124).

Judge MacDonald then noted other relevant facts which were that when Officer Bianchi approached the vehicle, he noticed a strong order of intoxicants and the petitioner admitted to the Officer that he had been drinking. (Tr, 12/11/96, p 124). Judge MacDonald also noted that the petitioner had failed the field sobriety tests. Judge MacDonald concluded that ". . . based on the Officer's observation and experience, he had reasonable cause to make an investigatory stop of the petitioner, and when he found out the Petitioner had been drinking, he had every right to have the sobriety tests administered." (Tr, 12/11/96, pp 124-125). Judge MacDonald concluded that the Officer had a right to administer the PBT test. (Tr, 12/11/96, p 125). He ultimately concluded:

> "He observed his driving, this gave him a reasonable cause to stop the Defendant. After he stopped him, he had reasonable cause to believe that he was intoxicated, particularly in light of the fact that he admitted that he had

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[2] Judge MacDonald indicated that there was a question of fact as to the distance at which Officer Bianchi first observed the defendant. With respect to that disputed fact, he stated that he would have to look at it in a light most favorable to the prosecution. (Tr, 12/11/96, pp 122-123).

> been drinking and that he also failed the field sobriety tests, and he had cause to administer the PBT, and arrest the Defendant for OUIL."

(Tr, 12/11/96, p 126).

Subsequently, the petitioner filed an application for leave to appeal to the circuit court. On February 14, 1997, the circuit court entered its order granting leave to appeal. Two days earlier, on February 12, 1997, the petitioner had plead no contest to the charge of unlawful blood alcohol level with a dismissal of the operating under the influence of intoxicating liquor charge. The petitioner was sentenced on February 13, 1997, by the district court. On March 7, 1997, the circuit court entered its order staying the enforcement of the trial court's sentence pending the exhaustion of appeal rights except as to driver's license sanction.

Following briefing, oral arguments were held in the circuit court on March 26, 1997, before Wayne County Circuit Court Kathleen MacDonald. Judge MacDonald rejected the arguments of the petitioners stating:

> ". . . it is really a standard of reasonableness that is to be applied for both the stop and search of moving vehicles, *People v Wayland* at 390 Mich 672, 1986. Reasonableness is to be determined from the facts and circumstances of each case and fewer foundational facts are necessary to support a finding of reasonableness when moving vehicles are involved than if a house or a home were involved. A stop of a motor vehicle for investigatory purposes may be based upon fewer facts than those necessary to support a finding of reasonableness where both a stop

and search is conducted by the police.

I find this case to be closer to *People v Christy* [sic] at 206 Mich App 304, 1994 case, where the Court found that the stop of the vehicle wasn't [un]reasonable; other than in that case the arresting officer – well, the arresting officer followed the Defendant for a short period in this time, too; observed the vehicle drift to the right and left; and the Court stated that the officer had – the erratic driving gave rise to a reasonable suspicion of unlawful intoxicants so as to justify the stop by the police officer.

The police officer here stated that he, at approximately four a.m. he was traveling westbound on Hines Drive from Haggerty in a fully marked patrol car when he saw a set of headlights in the rear view mirror. He testified he believed he was traveling 35 to 40 miles an hour and the headlights were closing in on him quickly. He testified the vehicle approached him from behind, was driving left of the center line, although not completely over the center line and varying over the yellow line.

The officer stated that he saw the vehicle from his rear view and side view mirrors and observed the vehicle drive left of center four or five times. He also testified that he pulled over to the side of the road to allow the vehicle to pass him; that the vehicle passed him and accelerated quickly; that the officer stated it

took him half way through the bend to catch up with the vehicle. He testified that he has made over 500 arrests of individuals for drunk driving and he recognizes certain things which are indicative of people who are driving under the influence or impaired. He testified that he saw several of those indications in Mr. Campbell's driving that night.

The Court held that based on the officer's observation and his experience, the officer had reasonable cause to make the stop. The Court more specifically stated that the officer first saw the Defendant at a distance; that the Defendant was behind the officer. The Court noted that the Defendant approached the patrol car at a high rate of speed, at least four times crossed the center of the road. The Court further stated that it would be easier to see a car at night on the curves than during the day. The Court did not comprehend why an individual would come so close behind a police car but recognized that stranger things had happened. The Court reiterated the officer's testimony that the car was traveling at a high rate of speed and concluded, based on all of this, that it was reasonable to believe that he was traveling at a high rate of speed, and that he crossed the center line, and that there may have been some indication alcohol was involved so the police officer had every right to stop the individual and find out whether or not he was drinking. That's at 124.

I believe that there is certainly enough facts.

> I don't believe from the transcript that I read that the Court was ever abdicating a decision on the facts. He used the proper standard that when you view these facts, you view them in light most favorable to the non-moving party. That doesn't ever change the burden of proof here. The people still had to produce evidence sufficient to get - for the Court to make that finding.
>
> I think that he did not commit error and the Court's findings of fact, after reviewing the entire transcript and the remainder of the evidence were supported by the record and this Court is not left with a firm conviction that a mistake has been made. I think also that the Court, although you may believe that your expert was right and the police was wrong, the Court certainly made a credibility decision and found the officer's testimony to be more credible than your expert's, so his findings were not clearly erroneous; and lastly, I think there is an issue as to the sobriety tests and the Breathalyzer.
>
> I agree with the People on this one. It doesn't matter, I don't think, after the Defendant himself admits that he'd been drinking and after the stop. Therefore, for all those reasons, the lower Court's decision is upheld."

(Tr, 03/26/97, pp 20-23). The order affirming decision of the trial court on the issues raised by petitioner's appeal was entered on April 30, 1997.

On May 19, 1997, the petitioner filed an application for leave to appeal in the Michigan Court of Appeals. That application was assigned Docket No: 203372. Respondent filed an answer to the application on June 12, 1997. That application was dismissed by the Court of Appeals for failure to pursue the case in conformity with the court rules. The dismissal was without prejudice. On January 7, 1998, petitioner filed another application for leave to appeal in the Court of Appeals. That application was assigned Docket No: 208759. Respondent filed its brief in opposition on January 19, 1998. On June 18, 1998, the Court of Appeals entered its order in Docket No: 208759 denying the delayed application for leave to appeal for lack of merit in the grounds presented.

On July 8, 1998, petitioner filed his application for leave to appeal in the Michigan Supreme Court. That application was denied by the Michigan Supreme Court on February 25, 1999.

ARGUMENT

PETITIONER'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. Introduction

The reasons advanced by petitioner for granting the petition for writ of certiorari are such that coherent legal positions are somewhat difficult to pinpoint.

Petitioner seems to suggest that this Court should determine whether field sobriety tests are a seizure subject to the Forth Amendment scrutiny of reasonableness because, according to petitioner, the trial court in this case did not require the People to carry the burden of proof to establish the propriety of the field sobriety tests.

Well, the issue of whether the People were required to establish reasonable cause to administer the field sobriety tests was never raised below. In defendant's motion to dismiss for failure to establish the requisite reasonable cause to effect a traffic stop and otherwise, dated October 23, 1996, petitioner argued that reasonable cause was necessary to effect a traffic stop, that reasonable cause was necessary to request a preliminary breath test and that probable cause was necessary to effect an arrest. Motion to dismiss, ¶¶ 7(B), (D), and (E). Petitioner argued that the requisite reasonable cause for the traffic stop and the preliminary breath test was not established and that the requisite probable cause to arrest was not established. Petitioner never raised the issue of whether field sobriety tests are a seizure subject to the Forth Amendment scrutiny of reasonableness. Frankly, the requirement that the People establish reasonable cause was assumed.

In his subsequent briefs to the Michigan circuit court, Court of Appeals, and Supreme Court, petitioner raised three issues, to wit: (1) that reasonable cause did not arrest to affect the traffic stop, (2) that probable cause did not exist to arrest him and (3) that the trial court judge unconstitutionally shifted the burden of proof regarding reasonable cause and probable cause to the defendant. Those are the only issues preserved. None of them has any merit.

B. The Michigan district court, the circuit court, the Court of Appeals and Supreme Court properly determined that the traffic stop was reasonable under the Fourth Amendment because Officer Bianchi had reasonable cause to believe that a traffic violation had occurred.

In *Whren v United States,* 517 US 806, 116 S Ct 1769, 135 L Ed 2d 89 (1996), this Court held that a traffic stop is reasonable under the Fourth Amendment so long as the police officer had reasonable cause to believe that a traffic violation had occurred. 116 S Ct at 177. It is well established that brief investigative stops short of arrest are permitted where police officers have a reasonable suspicion of ongoing criminal activity. *People v Christie (On Remand),* 206 Mich App 304, 308, 520 NW2d 647 (1994) citing *Terry v Ohio,* 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). In order for law enforcement officers to make a constitutionally proper investigative stop, the totality of the circumstances must yield a particularized suspicion that the person stopped has been, is or is about to be engaged in criminal activity. *People v Shabaz,* 424 Mich 42, 59, 378 NW2d 451 (1985); *People v Nelson*, 443 Mich 626, 632, 505 NW2d 266 (1993).

When dealing with a vehicle, the reasonable and articulable suspicion must be directed at the vehicle. *People*

v Bordeau, 206 Mich App 89, 93, 520 NW2d 374 (1994). Fewer foundational facts are necessary to support a finding of reasonableness where a moving vehicle is involved. *People v Christie, supra,* at 308-309 citing *People v Whalen*, 390 Mich 672, 682, 213 NW2d 116 (1973).

The Michigan Court of Appeals has held that erratic driving can give rise to a reasonable suspicion of unlawful intoxication so as to justify an investigatory stop by a police officer. *People v Chinn*, 141 Mich App 92, 366 NW2d 83 (1985); *People v Christie, supra.*

Here, the traffic stop of the defendant was reasonable because Officer Bianchi had observed a traffic violation, defendant's vehicle crossing the center line four or five times, and Officer Bianchi had reasonable cause to suspect ongoing criminal activity, i.e., that the defendant may have been intoxicated. Defendant's vehicle approached the vehicle of Officer Bianchi from the rear and closed the gap between the two of them. Defendant's vehicle was seen crossing the center line four or five times. These are, to use the language of *People v Christie, supra,* ". . . classic indicia of an intoxicated driver." The investigatory stop was a "minimal intrusion" of defendant's Fourth Amendment rights in light of defendant's potential danger to the public. *People v Nelson, supra,* at 637. The same reasonable suspicion of unlawful intoxication which justified the stop of the petitioner also served to justify and warrant the administration by Officer Bianchi of the field sobriety tests to the petitioner (which he failed).

C. The district court, the circuit court, the Court of Appeals and the Supreme Court properly determined that Police Officer Bianchi had probable cause to arrest the defendant

Because the investigative stop itself was proper, Officer Bianchi was permitted to briefly detain the defendant and make reasonable inquiries aimed at confirming or dispelling his suspicions. *People v Nelson, supra*, at 637; *People v Weoman*, 218 Mich App 406, 411, 554 NW2d 577 (1996). During Officer Bianchi's inquiry, he received information from the defendant himself that he had been drinking. *Berkemer v McCarty*, 468 US 420; 104 S Ct 3138; 82 L Ed 2d 317 (1984) and *People v Chinn, supra*. The defendant then failed the field sobriety test. Defendant was then given a PBT. The foregoing circumstances and the information derived therefrom gave Officer Bianchi a reasonable suspicion that the defendant had been engaged in criminal activity, i.e., driving under the influence of intoxicants, and justified the arrest of the defendant without a warrant. MCLA 764.15(1)(C), MSA 28.874(1)(C).

D. The district court did not impose the burden of proof on the defendant. The circuit court, the Court of Appeals and the Supreme Court correctly agreed.

Petitioner asserts, but does not show, that the district court imposed the burden of proof on him to establish the putative illegality of the traffic stop and arrest. The argument has no merit. The district court did not impose the burden of proof on the petitioner.

The motion filed by the defendant which lead to the evidentiary hearing which he requested and ultimately to the ruling of the district court which he has challenged and continues to challenge was a Motion to Dismiss for Failure of the People to Establish the Requisite Reasonable Cause to Effect a Traffic Stop and Otherwise. Since the defendant moved to dismiss the charge against him, the district court

properly viewed the evidence at the evidentiary hearing in the light most favorable to the non-moving party. *People v Hampton,* 407 Mich 354; 285 NW2d 284 (1979); *People v Vail*, 393 Mich 460, 463; 227 NW2d 535 (1975); *People v Wright,* 99 Mich App 801, 818; 298 NW2d 857 (1980).

Respondent contends that the district court properly viewed the evidence in the light most favorable to the prosecution in making its determination that Officer Bianchi had reasonable cause to stop the defendant and probable cause to arrest him. The burden of proof was never shifted. It always remained on the prosecution. All that district court Judge MacDonald determined was that the prosecution had met its burden of establishing reasonable cause to stop and probable cause to arrest.

RELIEF REQUESTED

For the foregoing reasons, respondent, The People of the City of Plymouth, contend that petitioner's petition for writ of certiorari should be denied.

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